SUPREME COURT, U. S.

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MICHAEL RODAK, JR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-312

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

SANDRA J. DREW,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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SANDRA J. DREW,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, LIBERTY MUTUAL INSURANCE COMPANY, prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this case on June 4, 1973 (A1), Petition for Rehearing denied July 12, 1973 (A2).

OPINIONS BELOW

The opinion of the Court of Appeals for the Fifth Circuit, No. 72-3003 (Appendix A3-A15, hereinafter referred to as the "decision") is reported at 5 EPD ¶ 8652, ___F.2d___. The Order and Judgment of the United States District Court for the Northern District of Georgia, Atlanta Division (Appendix A16-A22), is reported at 5 EPD ¶ 8561.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254 (1), this Petition for Writ of Certiorari having been filed, in accordance with 28 U.S.C. Section 2101 (c), within 90 days of the entry of the judgment of the United States Court of Appeals for the Fifth Circuit.

QUESTIONS PRESENTED

The issue raised by the proceeding below is whether the District Court has jurisdiction under Title VII of the Civil Rights Act of 1964[1], as amended by the Equal Opportunity Act of 1972[2], to entertain a suit solely for preliminary injunctive relief *brought by an individual charging party* pending proceedings before the Equal Employment Opportunity Commission (hereinafter referred to as the "Commission") on the individual's charge which had been filed with the Commission only ten days prior to the filing of the instant law suit.

STATUTES INVOLVED

The relevant provisions of the 1972 Amendments, which require construction in this proceeding, read, in part, as follows:

Section 706 (f)(1):

> "If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under Subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any re-

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[1]42 USC 2000 (e) *et seq.*, hereinafter referred to as "Title VII".

[2]P.L. 92-261, 86 Stat. 103 *et seq.*, March 24, 1972, hereinafter referred to as the "1972 Amendments".

spondent . . . If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section . . . , or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. . . ."

Section 706(f)(2):

"Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission . . . may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. Any temporary restraining order or other order granting preliminary or temporary relief shall be issued in accordance with rule 65 of the Federal Rules of Civil Procedure. It shall be the duty of a court having jurisdiction over proceedings under this section to assign cases for hearing at the earliest practicable date and to cause such cases to be in every way expedited."

STATEMENT OF THE CASE

I. This Case is a companion case to Liberty Mutual v. Equal Employment Opportunity Commission in which a Petition for Writ of Certiorari is pending.

In this matter of first impression, the Court of Appeals has decided that the District Court has jurisdiction to entertain a suit brought by an individual charging party, solely request-

ing preliminary injunctive relief, concurrently with recently instituted and pending proceedings on the individual's charge before the Commission and concurrently, for part of the time, with a suit for almost identical relief which had been filed by the Commission. This case is the companion to the case of *Liberty Mutual Insurance Company* v. *Equal Employment Opportunity Commission*[3], an action brought by the Commission under authority of the 1972 Amendments, in which complete preliminary relief, ordering reinstatement and full backpay to the respondent here, was granted by the District Court, and affirmed by the Fifth Circuit, absent any prior agency or judicial determination that the Act has been violated.

II. The Facts Underlying the Complaint.

Sandra Drew was discharged on April 7, 1972 by petitioner for harassing management and instigating employee discontent; she had been disciplined for her caustically critical public remarks to supervisors and co-employees concerning the wage scale, a proposed cost of living increase and work assignments of the petitioner in its Atlanta, Georgia office.

Unknown to the petitioner, Mrs. Drew had filed a charge on April 6, 1972 alleging sexual discrimination with the EEOC the day before her discharge, which she thereafter amended on April 10, 1972 to include the fact of her discharge.

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[3]A Petition for Writ of Certiorari (to review the decision reported at 475 F. 2d 579) in this companion case was docketed on June 26, 1973 as Number 73-12 and seeks review of that decision of the Fifth Circuit. The proceedings in said matter are hereinafter referred to as the "Commission Case."

Mrs. Drew filed her Complaint in the District Court on April 20, 1972 alleging that she was discharged by the petitioner in violation of the Act in that, allegedly, she was discharged because she filed a charge with the EEOC and because she opposed employment practices made unlawful by Title VII. The Complaint prayed, *inter alia*, that the District Court: (1) order the Commission to commence an investigation of plaintiff's April 10, 1972 charge immediately and (2) order petitioner to reinstate Mrs. Drew with full backpay to her former position pending investigation and disposition of the matter of the rents.

In response, petitioner moved to dismiss the action on the grounds that the complaint did not state a cause of action since, *inter alia*, the appropriate jurisdictional prerequisites had not been alleged and the Commission, from whom a part of the requested relief would have been required, was an indispensable party. The Commission was never joined but, on May 12, 1973, filed its separate lawsuit (the Commission Case) seeking the temporary relief of reinstatement and full backpay. To meet petitioner's jurisdictional challenge, Mrs. Drew on May 23, subsequent to the filing of the Commission's lawsuit, amended her complaint to allege the receipt of a "Notice of Right to Sue" thirty-seven days after filing her charge.

III. The Decisions Below.

On May 30 and 31, 1972, the Court heard evidence in the Commission Case for preliminary injunctive relief and, as a matter of convenience, permitted Mrs. Drew's attorney to participate in a supplementary role since the court's jurisdiction over her independent suit had not yet been formally resolved. Immediately following the conclusion of the testimony on May 31, the Court entered an order in the Commis-

sion Case which directed that Mrs. Drew be reinstated forthwith with full backpay thus granting the Commission all of the relief sought independently by Mrs. Drew excepting her request for attorney's fees.

Thereafter, by order of July 13, 1972 (A16-A22), the lower court dismissed Mrs. Drew's complaint, as amended. First, the court refused to accept jurisdiction over a private individual's attempt to secure temporary injunctive relief in advance of the 180 day waiting period mandated by Title VII. Then, addressing itself to Drew's assertion that the court exercise its purported "inherent equitable jurisdiction", the court stated:

> "Assuming without deciding, that in an appropriate case the court could take jurisdiction in order to grant interim relief pending the EEOC's conciliation or other action, this is not such a case".

The court reasoned that since the Commission had acted promptly (having conducted a prompt investigation prior to the institution of this instant suit by Mrs. Drew and having filed suit on May 12, 1972, while Mrs. Drew then was only initiating discovery), and had obtained a preliminary injunction for the benefit of Mrs. Drew (in the Commission Case), the jurisdictional fact, the Commission inaction necessary to invoke jurisdiction under Mrs. Drew's equitable theory, did not exist. Moreover, the district court noted that the private action was now "superfluous,"—that is, in effect, moot.

The Court of Appeals, however, despite its recognition that Mrs. Drew has already obtained complete relief in the Commission Case, reversed the judgment of the District Court on the basis that the District Court had, and should have asserted, jurisdiction of the individual cause presented; the Court of Appeals has ordered that the matter be remanded

for the purpose of awarding Mrs. Drew attorney's fees and costs. This Petition seeks a review of this order of the Fifth Circuit which, we submit, is appropriate for consideration together with a review of the Commission Case.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW RAISES IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT WHICH SHOULD BE, SETTLED BY THIS COURT.

I. The unsettled question as to whether an individual charging party has the right to seek preliminary judicial relief pending proceedings before the Commission.

Under the substantially altered enforcement scheme established by the 1972 Amendments, Congress has entrusted the Commission with the new authority to institute actions in the federal district courts to redress instances of unlawful employment discrimination following unsuccessful conciliation efforts (Sec. 706(f)(1)). The Commission, alone, is also empowered by the 1972 Amendments, in extraordinary cases, to seek temporary injunctive judicial relief pending the processing and final disposition of a charge by the Commission (Sec. 706(f)(2)).

Consistent with the Commission's enhanced new prosecutional role, private suits, although not entirely eliminated, are nonetheless severely circumscribed. Under Section 706(f)(1) of Title VII, one of the 1972 Amendments, Congress, while still permitting private suits to be instituted, expressly requires as a prerequisite thereto: (1) that the charge has been "dismissed by the Commission"; (2) or that "one hundred and eighty days" have elapsed "from the filing of such charge" and "the Commission has not filed a

civil action" or "entered into a conciliation agreement to which the party aggrieved is a party. . . ." There is no statutory provision whatsoever for any proceeding by a private party seeking temporary injunctive judicial relief.

The clear Congressional intent of the new statutory procedure is to allow the Commission sufficient opportunity to weed out meritless causes and to seek voluntary compliance in valid causes before a resort to the Courts (see pp. 10-11, *infra*.). The amended scheme of Title VII is to empower the Commission to seek out and thereafter to eliminate unlawful employment practices initially utilizing the informal methods of conference, conciliation and persuasion and failing such action by bringing a suit in the name of the Commission. In order to assure that the Commission will control the proceeding and thereby have adequate opportunity to achieve the successful resolution of a pending charge, the law provides that a charging party may not bring suit for the adjudication of rights under Title VII until expiration of the prescribed period of time allowing a reasonable opportunity for Commission activity.

Indeed, the decision below recognizes the Court's lack of jurisdiction to adjudicate the controversy on its full merits prior to expiration of the time of required agency deferral.[4] Yet the decision proceeds to hold that preliminary relief should be available to an individual without any such deferral to the Commission. This complete by-pass of agency action improperly subordinates the role of the Commission in the initial processing of a cause under Title VII in clear violation of the statutory scheme. The rationale of the decision appears to be a fear of the Court that irreparable damage may

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[4]Footnote 5 of the decision (A10) states: "She normally would not be permitted to file a suit on the merits unless the Commission had been unable for a period of 180 days to effect conciliation."

not otherwise be avoided. But the 1972 Amendment to the statute has provided a means of providing relief from any such occurrence: Title VII now empowers the Commission to seek and obtain temporary judicial relief where necessary to carry out the purposes of the Act.[5]

The decision does not take direct issue with the Petitioner's contention that it is incompatible to the general scheme of Title VII to allow for such premature private suits but instead concludes that the 1972 Amendments to Title VII did not forbid any such private action for preliminary relief which might have existed prior to the enactment of the 1972 Amendments. Finding no authority whatsoever for the prior existence of such jurisdiction under Title VII or any cases decided thereunder,[6] even before the 1972 Amendments, the Court analogized the instant case to suits brought to enforce rights under other laws which Mrs. Drew had not asserted.

Thus, the decision has created a new and unprecedented jurisdiction permitting a private action for preliminary relief in a Title VII case prior to the expiration of any period of deferral to the Commission. It is submitted that this extraordinary grant of jurisdiction to the Courts created by the decision, which ignores the plain statutory language of Title VII and radically reconstitutes the carefully structured enforcement scheme, is a matter properly to be determined by this Court.

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[5]Indeed, this preliminary judicial relief was sought and obtained by the Commission in the Commission Case within weeks of the filing of the instant action (see pp. 5-6, *infra.*).

[6]To the contrary, the prior decisions of the Fifth Circuit have implied that all private litigation had to await failure of the conciliation process or expiration of the statutory timetable. See *Pettway* v. *American Cast Iron Company*, 411 F. 2d 998, 1005 (1969) and *Jenkins* v. *United Gas Corp.*, 400 F. 2d 28, 32 (1968).

II. The unsettled question as to whether there is a mandatory one-hundred eighty day period of deferral to the commission before any private action may be instituted.

The instant lawsuit was instituted by Mrs. Drew ten days after filing her charge of an alleged illegal discharge with the Commission. At Mrs. Drew's request after she had filed the instant suit, the Commission issued a "Notice of Right to Sue Within 90 Days" on May 18, 1972 but the Commission nevertheless continued to proceed with its lawsuit which had been filed on May 12, 1972.

It is apparent that Mrs. Drew did not allow any reasonable time for Commission action and the decision below completely disregarded any statutory deferral period on the basis that such a deferral period does not apply to an action "to seek such temporary relief pending the action of the Commission".[7] The question thus raised is whether the 180 day period of required deferral to the Commission specified in Section 706(f)(1) is mandatory or may be dispensed with either by the Commission, by issuing its notice of right to sue, or by the Court, in the instance of a suit seeking only temporary relief.

It is submitted that the decision, in holding that the newly enacted 180 day waiting period is not a prerequisite to the institution of suits for temporary relief, directly contravenes expressed legislative intent. A comparison of the former Section 706(f) (1) provision and the current language (supra. pp. 2-3) manifests that, over the objection of some legislators,[8] the Commission's new right to sue was intended to supplant the former right to file a private action "after thirty days".

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[7]Footnote 5 of the decision (A10).

[8]See, e.g., comments of Rep. O'Hare, 117 Cong. Rec. H8521 (Sept. 16, 1971, daily ed.).

Although Congress decided not to eliminate private actions completely, Congress did impose a jurisdictional 180 day insulated period during which the threat of the Commission's new power could be brought to bear upon a respondent "to eliminate an alleged unlawful employment practice by informal methods"[9] without interference by private lawsuits, and, if such efforts failed, to institute court proceedings.[10] A cumulative reading of the statutory provisions plainly indicates that private relief was contemplated only as a last resort; such private actions are authorized only where the Commission is unwilling to sue on the aggrieved party's behalf (and dismisses the charge) or where, because of its administrative backlog, the Commission is unable to institute such proceeding with reasonable dispatch, a period which Congress fixed as 180 days from the filing of the charge.

In order to circumvent the clearly defined statutory 180 day waiting period, the decision equates the plaintiff's cause of action with that brought in *Sanders* v. *Dobbs House, Inc.*,

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[9]Conference Report, Section by Section Analysis, 118 Cong. Rec. H1862 (Mar. 8, 1972, daily ed.).

[10]This provision, adopted after substantial debate, was the product of a reasoned compromise between competing legislative forces. An attempt was made to terminate this 180 day period once an effort to require the Commission to bring suit after 30 days was defeated "in the interest of [affording the Commission] flexibility in working something out through voluntary compliance". 118 Cong. Rec. S469 (Jan. 25, 1972, daily ed.). This proposal was rejected, however and by unanimous resolution the 180 day waiting period was retained. 118 Cong. Rec. S470 (Jan. 25, 1972, daily ed.). Recently in a parallel situation within the sphere of judicial discretion, the Fifth Circuit properly limited the individual right to sue under the Act in order to harmonize conflicting federal policies. *Rios* v. *Reynolds Metals Co.* 2681 467 F. 2d 54 (5th Cir. 1972).

431 F. 2d 1097 (5th Cir. 1970). The Court has held that like the 1866 Civil Rights Act (22 U.S.C. Section 1981, hereinafter referred to as "Section 1981") applicable in *Dobbs*, Title VII has declared a right and therefore, like the decision in *Dobbs*, the Court decided it has jurisdiction to fashion a remedy. The significant difference between *Dobbs* and the instant case, however, is the distinction between Title VII and Section 1981. Section 1981 is a statute which, unlike Title VII, does not contain any comprehensive scheme for enforcement of rights, indeed which provide no remedy whatsoever for alleged violations, but rather merely states a broad declaration that such rights exist. Absent the statutory scheme of enforcement, the Court in *Dobbs* properly fashioned an appropriate remedy necessary for the preservation of the right. Conversely, however, Title VII sets forth in detail that the rights declared under the Civil Rights Act of 1964 are to be enforced through the processes of the Commission with an absolute requirement that suits by private parties for any complete adjudication of claimed rights be deferred until the Commission has had at least 180 days, that period of time which Congress has declared to be a reasonable opportunity to conciliate any controversy. The Fifth Circuit's logic of predicating its conclusion by analogizing decisions under Section 1981 fails because the rights of plaintiff do not arise under this earlier law. The entire claim of plaintiff has been created under Title VII: plaintiff alleges that she was discharged either for filing a charge with the Commission created by Title VII, or for protesting acts made unlawful under Title VII. The plaintiff's charges are particularly and specifically related to Title VII and would not come within the purview of Section 1981. Plaintiff has fully admitted this distinction in abandoning the allegations of any claim under Section 1981, a circumstance that the decision recognizes. (A5) Yet, the reasoning of the decision is

fully predicated upon rights that the Court assumes existed by analogy to Section 1981, and which the Court then assumes were not lost by enactment of the 1972 Amendments to Title VII. The illogical aspect of the decision is pointed out by the question it raises: how can the Court allow a suit for relief predicated upon one statute, which is not the basis for the claim, where the rights alleged arise under a different statute, which does not provide for the relief granted?

The judicial disregard of the legislatively imposed 180 day waiting period as a precondition to any private litigation is a matter appropriate for determination by this Court and recommends the issuance of a Writ of Certiorari.

III. The unsettled question as to the circumstances which render appropriate a suit for, or an award of, temporary relief.

Although the specific contention of this petition is that Title VII precludes jurisdiction for a private suit for preliminary injunction relief pending proceeding before the Commission, this case does also contain the identical issue raised in the Petition for Writ of Certiorari filed in the Commission Case:

Under what circumstances should preliminary relief be granted in an employment discharge case alleging a violation of Title VII (assuming, arguendo, that the Court does have jurisdiction)?

The decision concludes that the facts of this case bring it within "the limited class of cases" in which "the individual employee may bring her own suit to maintain the status quo" (A8). Yet, there is nothing in the facts of this case to distinguish it from the run-of-the-mill Title VII case. The decision fails to delineate any limitations to the so-called "limited class"; it is reasonably clear that the ordinary em-

ployment discharge case alleging discrimination pending before the Commission will readily meet the generic test. There is neither indication nor implication that preliminary relief may be denied in any instance where there is even a mere scintilla of evidence to support an allegation of a discriminatory discharge. Thus, the decision forbodes suits for preliminary relief by private individuals in virtually all Title VII discharge cases irrespective of any conclusion by the Commission that such relief is necessary to serve the interests of Title VII as that statute requires as a condition precedent to seeking such temporary relief.

Certainly the Court below could not have deemed Mrs. Drew's private suit justified on the basis of any administrative delay. The Commission had already commenced its investigation of the charge at the time this suit was filed. Such a "preliminary investigation" by the Commission in advance of filing any suit for temporary injunctive relief is required under Title VII (Section 706(f) (2)). To deny the Commission the right to conduct its investigation, at the risk of either being preempted by a private suit or accused of dilatory action, conflicts directly with Congress' intent that the Commission initially screen out the vast majority of cases where utilization of the extraordinary temporary injunctive provisions may not be warranted. Promptly following such investigation in this case, the Commission filed its suit for, and expeditiously obtained, temporary injunctive relief, the suit being instituted about one month after Mrs. Drew's charge had been filed with the Commission; thus, the proceedings patently were not an example of "inherently slow agency process" as Mrs. Drew alleged.

For all of the foregoing reasons, it is submitted that the District Court was correct, contrary to the decision of the Fifth Circuit, to the extent it held that even if jurisdiction

for a private suit for temporary relief can exist in an appropriate case, this was not such a case. The decision of the Fifth Circuit fails to delineate any standards as would indicate the circumstances when it would be appropriate to grant preliminary relief in a private suit and the need for the establishment of such standards by this Court recommends the issuance of a Writ of Certiorari.

CONCLUSION

For the foregoing reasons, this petition for Writ of Certiorari should be granted.

Respectfully submitted,

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United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1972

No. 72-3003

D. C. Docket No. CA 16496

SANDRA J. DREW,
Plaintiff-Appellant,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

Before TUTTLE, THORNBERRY and DYER, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by Counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, reversed and that this cause be, and the same is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered that defendant-appellee pay to plaintiff-appellant the costs on appeal to be taxed by the Clerk of this Court.

June 4, 1973

Issued as Mandate:

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3003

SANDRA J. DREW,
Plaintiff-Appellant,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion June 4, 1973 ——, 5 Cir., 1973 —— F.2d ——).

(July 12, 1973)

Before TUTTLE, THORNBERRY and DYER, Circuit Judges.

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 72-3003

SANDRA J. DREW,
Plaintiff-Appellant,

versus

LIBERTY MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Georgia

(June 4, 1973)

Before TUTTLE, THORNBERRY and DYER, Circuit Judges.

TUTTLE, Circuit Judge: This is an appeal by Sandra Drew, a white female[1] employee of Liberty Mutual Insurance Company seeking a preliminary injunction to prevent her employer from discharging her for what she alleged to be the filing of a complaint of discrimination on account of sex by her employer.

[1]We make this reference to the color and sex of the individual involved solely because it is essential in order to pinpoint the precise nature of the alleged discrimination which was the subject of this lawsuit.

The complaint which was filed on April 19, 1972, alleged in effect: (a) That Liberty Mutual, Drew's employer discriminated against female employees in the terms and conditions of employment in violation of Title VII of the Civil Rights Act of 1964, (b) That on April 6, 1972, she had filed a charge of discrimination with the Equal Employment Opportunity Commission, outlining Liberty Mutual's violations of Title VII, (c) That on April 7, 1972, the day after the filing of the charge, she had been fired, and (d) That her discharge was in retaliation for having filed her charge with the Commission and for opposing practices prohibited by Title VII. She alleged that this violated subsection 704(a) of Title VII.[2]

Ms. Drew's complaint sought an order temporarily reinstating her to the position she had held, awarding pay for the period she had been unemployed, prohibiting future reprisal. It sought to obtain temporary relief to preserve the status quo pending the Commission's administrative disposition of her charges.

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[2]This section provides as follows:

> "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title."

On May 2, Liberty Mutual moved to dismiss the complaint, primarily on the grounds that it failed to state a claim and, secondarily, on grounds that an indispensable party, the Commission, had not been joined. The trial court held a hearing on the motion to dismiss on May 4, and, according to the transcript of the proceedings, expressed a strong doubt as to the right of the individual employee to maintain such an action in light of the amendment to Title VII made effective in 1972, which amendment, for the first time, provided that in exceptional circumstances, following the filing of a complaint, the Commission "may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge."

Nevertheless the court did not dismiss the complaint but allowed the plaintiff's counsel additional time to file an amended complaint. One amendment was filed May 10, 1972, alleging a conspiracy in violation of one of the Civil War Civil Rights Acts, 42 U.S.C. § 1985(3), a ground for relief that has now been abandoned. A further amendment was filed May 23, 1972, which alleged that the Commission had, at Drew's request, issued a "Notice of Right to Sue Within 90 Days" on May 18, 1972.

In the meantime, on May 12, 1972, the Commission filed a complaint of its own alleging substantially the same fact as contained in the Drew complaint. It also sought the same injunctive relief. It must be noted that this was not a suit for final relief as provided for under Section 706(f)(1) of the Act. It was filed under the emergency provisions of Section 706(f)(2) seeking temporary relief pending the Commission's action on the original charge.

On May 30-31, 1972, a hearing was held, as stated by the trial court, on the suit filed by the Commission, although Drew's counsel was permitted to participate.

At this hearing the trial court found sufficient evidence to conclude that the Drew discharge had been retaliatory, in violation of subsection 704(a) and to warrant the granting of injunctive relief. In doing so, the court specifically found that the plaintiff had suffered irreparable harm. The court ordered Liberty Mutual to reinstate Ms. Drew at her former position with back pay. This judgment has recently been affirmed by this court. *Equal Employment Opportunity Commission v. Liberty Mutual Insurance Co.*, No. 72-2834, decided March 27, 1973, ____ F.2d ____.

Subsequently, the trial court dismissed the Drew complaint and awarded costs to the defendant. In its order the court held that Title VII did not confer jurisdiction to a private party to maintain a suit for injunctive relief, or any other relief, prior to the expiration of 180 days from submission of a charge to the Commission. In addition the court held that it lacked jurisdiction under its equitable powers because "the equity powers which the plaintiff and the EEOC assert that the court should exercise must be employed, if at all, only when there is no statutory basis for granting relief and when the relief sought cannot be obtained through any other forum or procedure." The court concluded that since the Commission had filed suit it was not necessary for Ms. Drew to invoke the extraordinary equity powers of the court in order to obtain the relief sought. The court held, therefore, that her action was "superfluous." It therefore dismissed the case "for lack of subject matter jurisdiction."

The court then made the following statement

> "However it is the opinion of the court that the plaintiff should be allowed to intervene in the case of EEOC v. Liberty Mutual Life Insurance Co., Civil Action No. 16590. *Up to the present time, plaintiff's interests have been adequately preserved by the existence of her individual action,* now dismissed by virtue of this order.

In the future her interests can best be protected by intervention. Accordingly, *she is directed to make application for intervention pursuant to Rule 24, Fed. R. Civ. P.*" (Emphasis added).

This wound up the matter below, except that costs were granted to the defendant and no attorney's fees for the plaintiff's counsel were allowed.

As we have pointed out, Ms. Drew has, under an order of the court, been reinstated to her position, pending further proceedings before the Commission. On the basis of this fact, the defendant contends that the case before us is now moot. We think the case is not moot, because the plaintiff below has been cast for court costs and, in spite of what the record in the trial court shows to have been a very substantial amount of effort expended on behalf of their individual client, who ultimately prevailed, at least by their joint efforts with counsel for the EEOC, the trial court did not even consider the propriety of awarding counsel fees as is authorized under the statute.

We are satisfied that if we should conclude that the Drew complaint, at the time it was filed, and for a period of time during which counsel performed substantial service for her, was properly in the district court, it would be our duty to remand to the trial court either for reinstatement of the suit, or for relieving the plaintiff of her obligation to pay for the costs of the action. The trial court would then also consider the award of attorney's fees for service performed for Ms. Drew.

The basic question decided by the trial court, and which we now hold is still a viable issue, is whether, when Congress enacted the 1972 amendments to the statute which for the first time gave the EEOC the right to file suit both for the enforcement of the rights of the employee and also to seek

temporary relief in a hardship case, it made such provision the exclusive means by which a person in Ms. Drew's position could be protected from irreparable damage to herself.

We conclude that in the limited class of cases, such as the present, in which irreparable injury is shown and likelihood of ultimate success has been established, (here this has been determined by the trial court), the individual employee may bring her own suit to maintain the status quo pending the action of the Commission on the basic charge of discrimination.

Our reasoning derives from the fact that, prior to the 1972 amendment, it is clear that a victim of such forbidden conduct as was here alleged had a clear right to seek equitable relief without having to await the convenience of the EEOC. The 1964 Act gave no power to the EEOC to bring such an action. However, the right to be free from such discriminatory conduct was expressly spelled out in the Act.[3] Thus, the court would have jurisdiction to fashion an equitable remedy to vindicate the right. See e.g., *Sanders v. Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir., 1970).

The situation in which Ms. Drew found herself would have been equated to that of Ms. Sanders in the *Dobbs* case. Ms.

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[3]42 U.S.C.A. § 2000e-2 (a):

> "It shall be an unlawful employment practice for an employer:
>
> . . . to discriminate against any individual . . . because he opposed any practice made an unlawful practice by this title, or because he made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this title."

Sanders sued under 22 U.S.C.A. § 1981,[4] one of the 1866 Civil Rights Acts. This Act, as will be seen, did not prescribe any remedy. It merely created a right in every person to make and enforce contracts "as is enjoyed by white citizens." Yet in *Dobbs* we sustained the right of Ms. Sanders to bring an action in equity in the district court. In doing so, we relied upon the Supreme Court decision in *Jones v. Alfred Mayer Co.*, 392 U.S. 409. The Supreme Court said:

> "The fact that 42 U.S.C. § 1982 is couched in declaratory terms and provides no explicit method of enforcement does not, of course, prevent a Federal Court from fashioning an effective equitable remedy. See, e.g. Texas and N.O.R. Co. v. Railway Clerks, 281 U.S. 548, 568-570; Deckert v. Independence Corporation, 311 U.S. 282, 288; United States v. Republic Steel Corp., 362 U.S. 482, 491-492; J. I. Case Co. v. Borac, 377 U.S. 426, 432-435. Cf. ex parte Young, 209 U.S. 123; Griffin v. School Board, 377 U.S. 218."

We have no doubt, therefore, that, prior to the amendment of 1972, Ms. Drew could have filed the suit for an injunction pending the consideration to be given to her charges by the EEOC.

Moreover, it must be remembered that what, and all, the plaintiff sought here was temporary relief to prevent irrep-

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[4]Section 1981 provides:

> "All persons within the jurisdiction of the United States shall have the same right in every state and territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other."

arable injury while the Commission carried on its function of negotiating and conciliating.[5]

As one commentator said concerning such an action prior to the amendment:

> ". . . It would seem that if the court has power to grant a preliminary injunction when the final decision-making authority is in an administrative body, a fortiori it should have the power to award such relief when it must only defer to the agency for a period of attempted conciliation and the final decisional authority rests with the court. Indeed, such an injunction might be essential to preserve the court's ability to later order meaningful relief." Note, Developments In The Law — Employment Discrimination in Title VII of the Civil Rights Act of 1964, 84 Harvard Law Review, 1109, 1257 (1971).

The case of *Gomez v. Florida State Employment Service*, 417 F.2d 569, 5th Cir., 1969, is also instructive in its holding that a right of action can be fashioned by a federal court when the beneficiary of a federal law contends he is deprived of its benefits.

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[5]It must be remembered that this is not an action brought by Mrs. Drew for a final adjudication of her right to be protected against the alleged discriminatory conduct of the defendant. That matter is being considered by the Commission in the usual course. She normally would not be permitted to file a suit on the merits unless the Commission had been unable for a period of 180 days to effect conciliation. The 180-day provision, of course, does not apply here, because the action brought by Mrs. Drew is merely one to seek temporary relief *pending the action of the Commission.* It is similar to the action which the Commission now has the right to bring under Section 706(f)(2).

The trial court, however, without specifically considering the question whether Ms. Drew might have had a right to bring such an action prior to the adoption of the amendment, concluded that the adoption of the amendment by Congress (by which, for the first time, the EEOC was given the right to file an enforcement proceeding in the court and also to "bring an action for appropriate temporary or preliminary relief pending final disposition of such charge" when the Commisssion concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the Act) made such provision the exclusive remedy available for the protection of an employee like Ms. Drew.

We find no basis for such a construction of the 1972 Act. The original Senate version of the proposed amendment to the Act and House version differed materially. At all stages in the proceedings strong minority reports attacked the authority finally given for the Commission to file enforcement proceedings in court and to take the action which we have just described pending a final decision by the EEOC. The House bill as passed provided that charges under Title VII are the exclusive remedy for unlawful employment practices. In Conference, the House receded. U. S. Code Congressional and administrative News 1972, p. 2181. This would be a strong indication of the intent of Congress *not* to exclude court action of the kind previously available.

Included in the legislative history is the unanimous comment of majority and minority committee reports to the effect that the Commission is simply overwhelmed with complaints. In the House Minority Committee report is a quotation of Chairman Brown that EEOC's backlog "now means an average delay of 15 months to 2 years before the Commission can complete action on a complaint." U. S. Code Congressional and Administrative News 1972, p. 2170.

Under the theory advanced by Liberty Mutual, and adopted by the trial court, Ms. Drew would have to be fortunate enough for her complaint with EEOC so to divert the attention of the staff from its overwhelming burden of cases to distinguish it as one which demanded immediate attention, resulting in the preparation and filing of a suit by staff attorneys pending the usual course of processing the complaint before she would ever be able to act on her own to seek an end to the irreparable damage she was suffering. If she had not been fortunate enough to obtain counsel willing to file the complaint for her one can only speculate as to the likelihood that the EEOC would have considered her case as having the merit which the trial court found it to contain. We should not lightly assume that Congress sought to do away with the chance that private litigants might in this manner alleviate the burden on EEOC members and staff in the rare situation when the likelihood of success and the need for immediate assistance could attract competent counsel to act.

We think that none of the criteria by which courts generally consider that an act of Congress, silent on the subject, is held to have impliedly destroyed an existing right of action are present here. In the Dobbs case it was argued that the enactment of Title VII of the Civil Rights Act of 1964 preempted the general remedial language of 42 U.S.C.A. § 1981; that is to say that the enactment of the statute we are concerned with prohibiting discrimination in employment on account of race and sex put an end to the right of a litigant to rely on Section 1981 as a basis for bringing a suit alleging a denial of the opportunity to be employed on account of race. We answered this contention by saying:

> "Since there is no language in Title VII that can remotely be construed as directly repealing Section 1981, the only means of repeal through preemption would be by implication. *Repeals by implication however are not favored.*

'The intention of the legislature must be clear and manifest . . .' " Citing Posada v. National City Bank, 296 U.S. 497, 503.

We also pointed to the case of *Waters v. Wisconsin Steel Works, etc.*, 427 F.2d 476, 7th Cir., 1970, in which it was held that:

"a right to sue under Section 1981 for private racial discrimination in employment existed prior to 1964. By enacting Title VII of the 1964 Civil Rights Act, Congress did not repeal this right to sue." 427 F.2d at 481.

In Dobbs we also stated that:

"This interpretation also finds support by analogy in Jones v. Alfred H. Mayer Co., where the court ruled that Title VIII of the Civil Rights Act of 1968 did not repeal Section 1982 by implication. Moreover, in Sullivan v. Little Hunting Park, Inc., 396 U.S. 229, 237, the court stated:

'We noted in Jones v. Alfred H. Mayer Co. that the Fair Housing Act of 1968, 82 Stat. 81, in no way impaired the sanction of Section 1982. 392 U.S. at 413-417. What we said there is adequate to dispose of the suggestion that the public accomodations provision of the Civil Rights Act of 1964, 78 Stat. 243, in some way supersedes the provisions of the 1866 Act. For the hierarchy of administrative machinery provided for the 1964 Act is not at war with the principles embodied in Section 1982.' "

Moreover, it is clearly the policy of the legislation to encourage the use of privately employed counsel as private attorneys-general to aid in the enforcement of this statute. This is made evident by the provision in Section 2000e-5 for the appointment of counsel in the event that the Commission dismisses a charge or if, after 180 days, the Commission has not filed a civil action.

As to the suggestion contained in the written opinion of the trial court that a chaotic situation would result if private litigants in the position in which Ms. Drew found herself upon her summary dismissal because of her having filed a complaint with the EEOC were permitted to seek temporary injunctive relief, we call attention to what this court has previously noted in *H. Kessler & Co. v. EEOC, et al.*, —— F.2d ——, (5th Cir., 1973) decided January 29, 1973. We there said:

> "The courts of this circuit have previously found that competent lawyers are not eager to enter the fray in behalf of a person who is seeking redress under Title VII. This is true even though provision is made for payment of attorney's fees in the event of success. In the case of Petete v. Consolidated Freight Ways, 313 F.Supp. 1271 (D.C. N.D., Tex., 1970), the court found that 'further complicating plaintiff's problem has been the reluctance of the attorneys she has approached to undertake the specific and complex challenges of a Title VII law suit which are not common to more frequently litigated areas of the law.' See also, Edmonds v. E. I. DuPont de Nemours & Co., 315 F.Supp. 523, 524 (D.C. Kansas, 1970); Sanders v. Russell, 401 F.2d 241 (CA 5, 1968)."

We conclude that there is no apparent set of circumstances that would cause us to construe the 1972 amendment as having impliedly destroyed the right of action which Ms. Drew would previously have had prior to its enactment. It was therefore error for the trial court to have concluded that Ms. Drew's case was subject to dismissal for failure to state a claim on which relief could be granted. It is not simple to determine what course of action should be pursued upon a remand to the trial court. As noted above Ms. Drew has been afforded the relief she sought in her law suit, by the filing of a suit a month later by EEOC seeking the same result.

Nevertheless, it is clear that if the Drew case was properly in court it was improper to charge her with the costs of the trial court action and to fail to consider the request for attorney's fees. Significantly, the trial court recognized the value of the work performed by Ms. Drew's counsel when it made the comment:

> "To the present time [July 12] plaintiff's interests have been adequately preserved by the existence of her individual action."

Furthermore, the court seemed to consider it necessary for her to be a party to the continuing action, because it further stated:

> "She is directed to make application for intervention pursuant to Rule 24 Fed. R. Civ. P."

It appears from the trial court records that Ms. Drew has now intervened in the EEOC suit. This being the case, we conclude that this is an adequate disposition of her interests and that on remand the court consider the awarding of counsel fees to Ms. Drew to represent the value of the services performed on her behalf by counsel up until the time when the intervention was accomplished, and including services performed by them in connection with this appeal.

The judgment is REVERSED and the case is REMANDED to the trial court for further proceedings not inconsistent with this opinion. The order of the trial court dismissing Ms. Drew's complaint is vacated pending a further order of the court dealing with the matter of counsel fees. Following the entry of such order, the suit can be dismissed with costs awarded to the plaintiff.

United States District Court

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

SANDRA DREW

vs.

LIBERTY MUTUAL INSURANCE COMPANY

CIVIL ACTION NO. 16496

ORDER

(Filed July 13, 1972)

This action seeks temporary injunctive relief for an individual plaintiff who was allegedly discharged from her employment in violation of Title VII of the Civil Rights Act of 1964. The action was filed on April 20, 1972, after plaintiff had filed two charges with the Equal Employment Opportunity Commission (hereinafter EEOC) but before any action had been taken by the EEOC. On May 12, 1972, an action against the defendant was filed by the EEOC seeking temporary injunctive relief pending final disposition by the EEOC of the complaints of employment discrimination which had been filed against defendant by Sandra Drew and Cheryl Goldberg.

On May 30 and 31, 1972, the court held an evidentiary hearing on the motions for preliminary injunction in these two companion cases. At the close of the hearing, the court ordered the defendant to reinstate plaintiff Drew in her former position and further ordered that she receive back pay from the date of discharge. A written order to that

effect is issued this date in the case of EEOC v. Liberty Mutual Life Insurance Company, Civil Action No. 16590.

The instant action is before the court on defendant's motion to dismiss the complaint as amended. The question here presented is whether an individual has the right to come into federal district court seeking temporary injunctive relief pending disposition by the EEOC of a charge of employment discrimination. Plaintiff and the EEOC, arguing in support of plaintiff's right to maintain the independent action, have set forth four possible grounds upon which the court might allow plaintiff to assert her claim for preliminary injunctive relief, as follows: (1) a statutory right to proceed under § 706(f)(2) of the Equal Opportunity Act of 1972 [42 U.S.C. § 2000e-5(f)(2)]; (2) a right of action under 42 U.S.C. § 1985(3), the civil rights conspiracy statute; (3) a "right to sue letter" which was sent by the EEOC to the plaintiff on May 18, 1972; and (d) the traditional equity power of this court, by which it can grant preliminary injunctive relief pending determination by an administrative agency. For the reasons set forth below, the court finds that none of these four grounds is sufficient to confer jurisdiction upon the court.

In its order of May 30, 1972, and in discussions in open court, the court has already set forth its conviction that § 706(f)(2) of the Equal Employment Act of 1972 provides only that the EEOC may seek preliminary relief in federal district court. That statute makes no mention of a private individual's right to seek injunctive relief from the court pending disposition by the EEOC. Accordingly, plaintiff has no right to proceed under this statute.

The question of plaintiff's right to proceed under 42 U.S.C. § 1985(3) was dealt with in the court's order of May

30, 1972, which dismissed for failure to state a claim the portions of the complaint which sought to state a claim under § 1985(3).

On May 30, 1972, plaintiff was allowed to amend her complaint by adding a claim of right to relief by virtue of a "right to sue letter" which was sent by the EEOC to plaintiff on May 18, 1972. Plaintiff now claims that any jurisdictional defect was cured by the receipt of the "right to sue letter" and the amendment of the complaint to reflect receipt of that letter. Defendant has moved to dismiss this portion of the complaint as well.

The Equal Employment Act of 1972 provides that:

> . . . . If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission, or if within one hundred and eighty days from the filing of such change or the expiration of any period of reference under subsection (c) or (d), whichever is later, the Commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (B) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice . . . . 42 U.S.C. § 706(f)(1).

The amended § 706 makes no mention of the right which a complainant had under Title VII prior to the 1972 amend-

ment, to a "right to sue letter" thirty days after the filing of a charge with the EEOC. 42 U.S.C. § 706(c), now amended. The new law completely supplants the earlier scheme; the reasoning of Congress was to extend the time period during which the EEOC seeks to effectuate conciliation.

The "right to sue letter" which was issued to plaintiff Drew by the EEOC was mailed only forty-two days after the filing of plaintiff's first charge with the EEOC. While the letter purports to enable plaintiff to bring suit in federal court, the letter has effect only insofar as it is issued in compliance with the terms of the statute. While prior to the 1972 Act a "right to sue letter" could issue thirty days after the filing of the charge with the EEOC, the new amendment makes clear that such a letter can be issued only after one hundred eighty days. Accordingly, the so-called "right to sue letter" issued to plaintiff before the expiration of the statutory period was erroneously issued and has no legal effect. Jurisdiction of this court cannot then be founded on the "right to sue letter" of May 18, 1972.

The final jurisdictional basis urged by the plaintiff and by the EEOC is that the court, as an exercise of its traditional equity power, has the power and the jurisdiction to grant preliminary injunctive relief pending final disposition by the EEOC of the charge of discriminatory employment practices. Relying in particular on *Murray* v. *Kunzig*, ——F.2d—— (D.C. Cir. Feb. 29, 1972), the EEOC argues that absent a clear statutory provision negating such jurisdiction, the court has jurisdiction to maintain the *status quo* and thus render *more meaningful* the administrative proceedings. The EEOC has cited no case, however, where the court has assumed jurisdiction for purposes of granting

preliminary injunctive relief in a Title VII situation. The question is thus a novel one and must require for its resolution a careful consideration of the statute here involved in order to determine to what extent that statute as amended defines the exclusive procedures in employment discrimination cases.

However, in the instant case the court need not decide that issue. Assuming, without deciding, that in an appropriate case the court could take jurisdiction in order to grant interim relief pending EEOC's conciliation or other action, this is not such a case. The equity powers which the plaintiff and the EEOC assert that the court *should exercise must be employed, if at all, only when there is no statutory basis for granting relief and when the relief sought cannot be obtained through any other forum or procedure.* In the instant case the EEOC has taken advantage of the power newly conferred upon it by the 1972 ACT to come into federal court seeking preliminary injunctive relief on behalf of a complainant pending disposition of her charge before the EEOC. The EEOC has sought and obtained a preliminary injunction for the benefit of Sandra Drew. Thus in the instant case of Sandra Drew, in order to obtain the relief sought, need not invoke the extraordinary equity powers of this court. Plaintiff Drew's interests have been maintained, on the question of a preliminary injunction, by the EEOC's exercise of its statutory authority. Her private action seeking identical relief through the extraordinary and inherent equity power of the court is superfluous and is hereby DISMISSED for lack of subject matter jurisdiction.

However, it is the opinion of the court that the plaintiff should be allowed to intervene in the case of *EEOC* v. *Liberty Mutual Life Insurance Company,* Civil Action No.

16590. Up to the present time, plaintiff's interests have been adequately preserved by the existence of her individual action, now dismissed by virtue of this order. In the future her interests can best be protected by intervention. Accordingly, she is directed to make application for intervention pursuant to Rule 24, Fed. R. Civ. P.

The court has today DISMISSED plaintiff's action for lack of subject matter jurisdiction and it is ORDERED AND ADJUDGED that the same be, and is hereby DISMISSED. The court has further directed that plaintiff make motion to intervene in Civil Action No. 16590.

IT IS SO ORDERED.

This, the 12th day of July, 1972.

Richard C. Freeman

RICHARD C. FREEMAN
United States District Court

United States District Court

FOR THE

NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

SANDRA J. DREW

vs.

LIBERTY MUTUAL INSURANCE COMPANY

JUDGMENT

This action came on for consideration before the Court, Honorable RICHARD C. FREEMAN, United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered.

It is Ordered and Adjudged that the plaintiff take nothing, that the action be dismissed and that the defendant LIBERTY MUTUAL INSURANCE COMPANY recover of the plaintiff SANDRA J. DREW its costs of action.

Dated at Atlanta, Georgia, this 13th day of July, 1972.

Filed and entered in Clerk's Office July 13, 1972.
BEN H. CANTER, *Clerk*

BY: PEGGY W. MONTGOMERY
Deputy Clerk

BEN H. CANTER
Clerk of Court

BY: PEGGY W. MONTGOMERY
Deputy Clerk

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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 72-312

MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
PETITIONER

v.

DAVID WARE, ET AL.

ON WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FOR THE FIRST APPELLATE DISTRICT

BRIEF OF THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

The United States will discuss the following question:

Whether, where an employee of a member firm of the New York Stock Exchange has entered into an agreement to arbitrate any dispute relating to his employment, as required by a rule of the Exchange, the Securities Exchange Act of 1934 preempts the application to such an employment dispute of a California statute providing that actions for wages can be maintained without regard to arbitration agreements.

THE INTEREST OF THE UNITED STATES

At the Court's invitation, the United States filed a memorandum *amicus curiae* at the petition stage. The government has an interest in the issues raised by the parties, which concern the effect of the Securities Exchange Act of 1934 on the applicability of state law o rules of a stock exchange registered with and regulated by the Securities and Exchange Commission.

STATEMENT

Petitioner ("Merrill Lynch"), a securities broker-dealer registered with the Securities and Exchange Commission, is a member of several stock exchanges located in different states, including the New York Stock Exchange, located in New York. It has a profit-sharing plan for its employees containing a provision that any employee who voluntarily terminates his employment with Merrill Lynch forfeits his vested interest in the plan if he subsequently is employed by a competitor of Merrill Lynch or establishes a competitive business (A. 38).[1]

Respondent David Ware, a California resident and a former registered representative of Merrill Lynch employed at one of its California offices, has been denied distribution of his earned profit-sharing credits under this forfeiture provision. Mr. Ware brought a class action in a state court in California, alleging that the forfeiture provision was invalid under California Business and Professions Code Section 16600 (Pet.

[1] "A." refers to the printed appendix. "Pet. Br.", or "Res. Br." refers to petitioner's or respondents' briefs. "Pet. A" refers to Appendix A of petitioner's brief.

Br. 4), which voids any contract to the extent that an individual is restrained from engaging in a lawful occupation.

Merrill Lynch petitioned for an order compelling arbitration of the dispute on the basis of a written agreement between it and Mr. Ware in which he agreed that any dispute arising out of his employment would be settled by arbitration in accordance with the rules of the Exchange (A. 53, 55–56; cf. Pet. A8). Rule 347(b) of the Exchange provides that any controversy between a registered representative and a member of the Exchange arising out of the representative's employment by a member thereof shall be settled by arbitration (Pet. A9).

The trial court denied the petition to compel arbitration, and the California Court of Appeal affirmed on the basis of Section 229 of the California Ann. Labor Code (Pet. Br. 5), which provides that actions for wages can be maintained without regard to arbitration agreements.

DISCUSSION

1. A federal law will not ordinarily be found to supersede or preempt application of a state law unless there is "such actual conflict between the two schemes of regulation that both cannot stand in the same area," or there is "evidence of a congressional design to preempt the field." *Florida Lime & Avocado Growers, Inc.* v. *Paul*, 373 U.S. 132, 141. A finding of preemption may be dictated by the nature of the regulated subject, *id.* at 142, by the existence of a pervasive and comprehensive scheme of federal

regulation that "requires a uniform and exclusive system of federal regulation" to fulfill the federal statutory purposes, *City of Burbank* v. *Lockheed Air Terminal, Inc.*, 411 U.S. 624, 639, or by the presence of such a conflict with the federal statute or the federal regulatory scheme that application of the state law would frustrate the purpose of the federal law. *Colorado Anti-Discrimination Comm'n* v. *Continental Air Lines, Inc.*, 372 U.S. 714, 724; *Rice* v. *Chicago Board of Trade*, 331 U.S. 247, 253–255.

Under these principles, we submit that in the circumstances of this case, Section 229 of the California Ann. Labor Code has not been preempted by the Securities Exchange Act of 1934.

2. Prior to enactment of the Securities Exchange Act of 1934, the power of regulation of the nation's securities exchanges rested primarily with the exchanges themselves, subject to such limited and largely ineffectual state or local laws as might have borne upon their operations. The legislative history of that Act, engendered by the stock market crash of 1929, reveals that Congress concluded that the prevailing degree of reliance on self-regulation of the activities of exchanges and their members was inadequate, that their autonomy should be limited, and that a measure of federal regulation was required.[2] But Congress did not give the newly-created Securities and Exchange Commission total and exclusive power over

[2] See generally *Stock Exchange Practices*, Report of the Senate Committee on Banking and Currency, S. Rep. No. 1455, 73d Cong., 2d Sess.; S. Rep. No. 792, 73d Cong., 2d Sess.; H. Rep. No. 1383, 73d Cong., 2d Sess.

all exchange functions. Rather, the Act provided for substantial federal regulation of exchange activities relating to investor protection, fair dealing in securities, and fair administration of exchanges; in other respects it continued the application of state law to the exchanges and, subject to the constraints of federal and state law, permitted exchanges to continue to regulate themselves to a substantial extent.

In particular, the Act drew a significant distinction between the scope of authority left to the exchanges free of federal regulation with respect to "administration of their ordinary affairs," and the restricted authority permitted to the exchanges with respect to matters subject to Commission supervision that more directly affect the investing public. Thus, the Senate Committee's report stressed that under the Act "the initiative and responsibility for promulgating regulations pertaining to the administration of their ordinary affairs remain with the exchanges themselves." But "where * * * [exchanges] fail adequately to provide protection to investors * * * the Commission is authorized to step in and compel them to do so." S. Rep. No. 792, 73d Cong., 2d Sess. 13.[5]

The Act contains a general standard that, to obtain registration, an exchange must have rules that are "just and adequate to insure fair dealing and to pro-

[5] The intention was therefore one of "letting the exchanges take the leadership with Government playing a residual role. Government would keep the shotgun, so to speak, behind the door, loaded, well oiled, cleaned, ready for use but with the hope it would never have to be used." Douglas, *Democracy and Finance*, 82 (Allen ed., 1940).

tect investors * * *." 15 U.S.C. 78f(d). In particular, a registered exchange is obliged to have rules that provide for disciplining its members for "conduct or proceeding inconsistent with just and equitable principles of trade" and that declare any violation of the Act or the Commission's rules or regulations thereunder to be such conduct. 15 U.S.C. 78f(b).

Otherwise, the Act left exchanges a zone of freedom and discretion as to their rules. Thus, exchanges are generally authorized under Section 6(c), 15 U.S.C. 78f(c), to promulgate and enforce rules "not inconsistent with * * * [the Act] and the applicable laws of the State in which * * * [the exchange] is located."[4] Moreover, Section 19(b) of the Act, 15 U.S.C. 78s(b), which authorizes the Commission "to alter or supplement" exchange rules on twelve specified subjects and "similar matters" by rule or regulation or by order, may be regarded as implicitly authorizing exchanges to adopt rules on the enumerated matters, none of which is involved here.[5]

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[4] Before an exchange may be registered, it must agree to furnish "copies of any amendments to the rules of the exchange forthwith upon their adoption," Section 6(a)(4), 15 U.S.C. 78f(a)(4). Commission Rule 17a-8, 17 C.F.R. 240.17a-8, requires that each exchange submit to the Commission the text of "any proposed amendment or repeal of, or any addition to, its rules," including its constitution, articles of incorporation, by-laws, and stated policies, at least three weeks before any action is taken on the proposal.

[5] This list encompasses—

"Such matters as (1) safeguards in respect of the financial responsibility of members and adequate provision against the evasion of financial responsibility through the use of corporate

The Commission is authorized to act under Section 19(b) when it finds a change in an exchange's rules to be

> necessary or appropriate for the protection of investors or to insure fair dealing in securities traded in upon such exchange or to insure fair administration of such exchange * * *.

Under Section 19(b), therefore, as the House Committee Report on the bill stated,

> [t]he Commission is empowered, if the rules of the exchange *in any important matter* are not appropriate for the protection of investors

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forms or special partnerships; (2) the limitation or prohibition of the registration or trading in any security within a specified period after the issuance or primary distribution thereof; (3) the listing or striking from listing of any security; (4) hours of trading; (5) the manner, method, and place of soliciting business; (6) fictitious or numbered accounts; (7) the time and method of making settlements, payments, and deliveries and of closing accounts; (8) the reporting of transactions on the exchange and upon tickers maintained by or with the consent of the exchanges, including the method of reporting short sales, stopped sales, sales of securities of issuers in default, bankruptcy or receivership, and sales involving other special circumstances; (9) the fixing of reasonable rates of commission, interest, listing, and other charges; (10) minimum units of trading; (11) odd-lot purchases and sales; (12) minimum deposits on margin accounts; and (13) similar matters."

The Commission has recognized:

"It is clear from this language [of Section 19(b)] that Congress did not intend to empower this Commission to alter or supplement *all* rules of a national securities exchange. At the same time it is plain that the language 'such matters as' and 'similar matters' calls for a broad construction of the section." *In the Matter of the Rules of the New York Stock Exchange*, 10 S.E.C. 270, 294.

> or appropriate to insure fair dealing, to order such changes in the rules after due notice and hearings as it may deem necessary. [H. Rep. No. 1383, 73d Cong., 2d Sess. 15. (emphasis supplied).]

In addition, the Commission has broad rulemaking authority under the Act to deal directly with certain other matters.[6] Accordingly, with respect to "any important matter," as the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs has recently observed,[7]

> [t]he Commission's powers of direct rule making * * * and its "reserved" authority in section 19 are complementary. Taken together they provide the Commission with pervasive regulatory authority over and responsibility for the operations of exchange markets and the conduct of persons who use those markets.

Finally, although criminal sanctions were provided for violations of the Act or Commission rules or regulations, 15 U.S.C. 78ff(a), there are no such federal sanctions for violation of rules of an exchange.[8]

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[6] *See, e.g.*, the Commission's authority to regulate exchange transactions concerning options under § 9(b) of the Act, 15 U.S.C. 78i(b); members trading for their own accounts, § 11(a), 15 U.S.C. 78k(a); hypothecating of customers' securities, §8, 15 U.S.C. 78h.

[7] *Security Industry Study*, Report of the Subcommittee on Securities of the Senate Committee on Banking, Housing and Urban Affairs, S. Doc. No. 93-13, 93d Cong., 1st Sess. 143.

[8] To the contrary, the Act merely provides that, to obtain registration, an exchange must file with the Commission an agreement "to enforce so far as is within its powers compliance by its members" with the Act and the Commission's rules and regulations thereunder. 15 U.S.C. 78f(a)(1).

3. Petitioner contends that application of Section 229 of the California Ann. Labor Code would lead to "disparate" results and would conflict with an exchange rule—Rule 347(b)—adopted under Section 6 of the Act, thus creating a conflict with the Congressional objective of self-regulation under the Act (Pet. Br. 8, 13). As the petitioner recognizes (Pet. Br. 22), however, neither the Securities Exchange Act nor any rule or regulation adopted thereunder by the Commission purports to establish arbitration as the generally-favored procedure for resolving all disputes between exchange members and their employees.[9] In other words, there is no basis for suggesting that Rule 347(b) was required to implement the literal language of the Act or any Commission rule.

Moreover, an exchange rule like Rule 347(b), which, if applicable, would merely require the respondent to arbitrate his dispute with his employer, deals with one of the "ordinary affairs" of the exchange that, as we have shown (*supra*, p. 5), Congress did not intend were to concern the Commission; the relationship of such a rule to investor protection, fair dealing or fair exchange administration—which are the standards under Section 19(b)—is extremely attenuated and peripheral, if it exists at all. Accordingly, the Commission would have no jurisdiction

[9] Petitioner's reliance (Pet. Br. 17) upon a passing reference to arbitration in *Silver v. New York Stock Exchange*, 373 U.S. 341, 354, n. 9, is misplaced, for there the Court was dealing, in another context, with exchange rules concerning relationships between exchange members and nonmember firms dealing in over-the-counter securities. See *infra*, pp. 11–12 n. 13.

under Section 19(b) to modify or review the operation of Rule 347(b).[10]

Neither the Act nor any Commission rule or regulation purports to displace state law or to require nation-wide uniformity as to an exchange's ordinary affairs. To the contrary, in the Act Congress several times indicated its intention that state law should continue to apply where the Act does not.[11] As we have noted, under Section 6(c) an exchange is authorized to adopt and enforce rules not inconsistent with the Act "and the applicable laws of the State in which it

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[10] In view of the Commission's lack of jurisdiction concerning such matters, its silence when Rule 347 was submitted in 1958 did not constitute "authoritative approval" of Rule 347 (b), as petitioner contends (Pet. Br. 18).

[11] For example, Section 28(a) provides that the rights and remedies provided by the Act are "in addition to any and all other rights and remedies that may exist at law or in equity," and further provides that nothing in the Act "shall affect the jurisdiction of the securities commission * * * of any state * * * insofar as it does not conflict with" the Act or the Commission's rules and regulations thereunder. 15 U.S.C. 78bb(a).

In addition, Section 28(b) provides in pertinent part:

"Nothing in this chapter shall be construed to modify existing law * * * (2) with regard to the binding effect of * * * [exchange] action [to settle disputes between its members] on any person who has agreed to be bound thereby."

The parties (Pet. Br. 15, Res. Br. 16–20) disagree about the proper applicability to the instant case of the "nonwaiver" provision of Section 29(a) of the Act, 15 U.S.C. 78cc(a), which provides:

"Any condition, stipulation, or provision binding any person to waive compliance with any provision of this chapter or of any rule or regulation thereunder, or of any rule of an exchange required thereby shall be void."

If, as we believe, the exchange rule in issue here is not "required" by the Act nor by "any rule or regulation thereunder," Section 29(a) is inapplicable.

is located." [12] There is nothing in the federal regulatory scheme to indicate that the activities of exchanges and their members should not continue generally to conform to applicable state and local law as they were required to do before the Act, where such local standards are not contrary to the express requirements of federal law, the rules or regulations of the Commission, or the regulatory scheme that the Act establishes.

The legislative history and express language of the Act show that a basic intent of the statute was protection of the investing public through the "maintenance of fair and honest markets." See Section 2 of the Act, 15 U.S.C. 78b. Exchange rules that are not substantially related to the statutory objectives should not be considered paramount to otherwise conflicting statutes. Compare *Silver* v. *New York Stock Exchange*, 373 U.S. 341.[13] Rule 347(b), as applied here, cannot be said to be related to the regulatory objectives of the statute in any but the most indirect manner, and there-

[12] Thus, if the law of New York, where the Exchange is located, contained a provision like Section 229 of the California Ann. Labor Code, there would be even less basis for a claim of preemption.

[13] The parties have made frequent reference to *Silver* v. *New York Stock Exchange*, 373 U.S. 341, where this Court considered the question whether the federal Securities Exchange Act of 1934 had impliedly repealed the federal antitrust laws. The preemption issue presented here, however, is governed, not by the principles concerning implied repeal and conflict between different laws adopted by Congress at different times, but by this Court's separate, if analogous, body of authority concerning the sensitive interrelationship between laws adopted by separate, coordinate sovereignties, federal and state. More

fore it is not the type of exchange self-regulation within the scope and purposes of the Securities Exchange Act that might oust conflicting provisions of state law. If the exchange rule in issue before this Court did involve a matter sufficiently important to the Act's objectives to be within the ambit of the Commission's pervasive regulatory oversight as delineated by the Act, state law in conflict with the rule would be preempted. However, the method for resolving disputes about the eligibility of former employees of a member firm to participate in a profit-sharing plan is not such a matter.

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so than with the case of implied repeal, "an unexpressed purpose to nullify" state law "is not lightly to be attributed to Congress," *Parker* v. *Brown*, 317 U.S. 341, 351, and a claim of conflict must be, if anything, even more persuasive where state law is concerned than where a claim of implied repeal of another federal law is made. *Penn Dairies, Inc.* v. *Milk Control Comm'n*, 318 U.S. 261, 275. As noted in the Memorandum for the United States as *amicus curiae*, p. 8, n. 6, filed in opposition to the petition in this case, the Commission and the Antitrust Division of the Department of Justice have different positions concerning the applicability of this Court's decision in *Silver* to matters subject to Commission oversight. Both agree, however, that *Silver* generally recognizes the continued applicability of the antitrust and other laws to exchange activities that are not subject to Commission oversight, and both agree that this case does not require the Court to consider further the issues raised in *Silver*.

CONCLUSION

For the foregoing reasons the judgment of the court of appeal should be affirmed.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 73-312

LIBERTY MUTUAL INSURANCE COMPANY,
Petitioner,

vs.

SANDRA J. DREW,
Respondent.

SUPPLEMENTAL STATEMENT OF THE PETITIONER

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Respondent.

SUPPLEMENTAL STATEMENT OF THE PETITIONER

On January 10, 1974 the United States Court of Appeals for the Sixth Circuit decided a case which has just come to our attention and which we would like to draw to the Court's attention. The case is *Jerome* v. *Viviano Food Company, Inc.*, 489 F. 2d 965 (6th Cir. 1974), which in our opinion is in direct conflict with the holding in the instant case and which, in our opinion, now creates a conflict between circuits. While the Sixth Circuit attempts to distinguish the *Viviano* case from the *Drew* case, we do not think they are distinguishable.

Respectfully submitted,

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In the Supreme Court of the United States

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No. 73-312

LIBERTY MUTUAL INSURANCE COMPANY, PETITIONER

v.

SANDRA J. DREW

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is filed in response to the Court's invitation to the Solicitor General to file a memorandum expressing the views of the United States.

QUESTION PRESENTED

Whether a private suit for preliminary injunctive relief from employment discrimination may be brought within 180 days of the filing of a charge of unlawful employment practice with the Equal Employment Opportunity Commission and before the Commission has taken any action with respect to that charge.

STATEMENT

1. This case arises under Title VII of the Civil Rights Act of 1964, 78 Stat. 253, as amended, 42 U.S.C. 2000e *et seq.*, pertaining to employment discrimination. Section 703(a)(1) of that Act, 42 U.S.C. 2000e–2(a)(1), makes it an unlawful employment practice for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." Section 704(a) of the Act further makes it an unlawful employment practice for an employer to discriminate against an employee "because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge" of employment discrimination with the Equal Employment Opportunity Commission.

The enforcement provisions of Title VII are set forth in Section 706. After state or local employment discrimination remedies, if any, have been exhausted, a person aggrieved by an unlawful employment practice may file a charge with the Commission. The Commission thereupon investigates to determine whether there is reasonable cause to believe that the charge is true and, if such reasonable cause is found, the Commission endeavors to eliminate the unlawful employment practice through conciliation and persuasion.

Section 706 further provides for judicial enforcement if voluntary compliance is not secured. As originally enacted, Section 706(e), 42 U.S.C. 2000e–5(e),

provided that "[i]f within thirty days after a charge is filed with the Commission * * * the Commission has been unable to obtain voluntary compliance * * *, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge * * * by the person claiming to be aggrieved * * *." The statute made no express provision for preliminary injunctive relief pending disposition of the charge by the Commission.

The enforcement provisions were amended in 1972, and this case arises under the Act as so amended. Section 706(f), 42 U.S.C. (Supp. II) 2000e-5(f), which replaced the former Section 706(e), now provides in pertinent part:

> (1) If within thirty days after a charge is filed with the Commission * * * the Commission has been unable to secure from the respondent a conciliation agreement * * * the Commission may bring a civil action against [the] respondent * * *. * * * The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission * * *. If a charge filed with the Commission * * * is dismissed by the Commission, or if within one hundred and eighty days from the filing of such charge * * * the Commission has not filed a civil action * * * or * * * entered into a conciliation agreement to which the person aggrieved is a party, the Commission * * * shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in

the charge * * * by the person claiming to be aggrieved * * *. * * *

(2) Whenever a charge is filed with the Commission and the Commission concludes on the basis of a preliminary investigation that prompt judicial action is necessary to carry out the purposes of this Act, the Commission * * * may bring an action for appropriate temporary or preliminary relief pending final disposition of such charge. * * *

2. With this statutory background in mind, we turn to the particular facts of this case. On April 6, 1972, respondent filed a charge of employment discrimination with the Commission, alleging that petitioner, her employer, had discriminated against her with respect to compensation because of her sex, in violation of Section 703(a)(1) of the Act. On the following day, petitioner discharged respondent without any prior warning. Shortly thereafter, on April 10, 1972, respondent filed a supplemental charge with the Commission, alleging that her discharge was in retaliation for the filing of her original employment discrimination charge and therefore violated Section 704(a).

Before the Commission took any action with respect to her charges of employment discrimination, respondent, on April 20, 1972, brought suit for preliminary injunctive relief in the United States District Court for the Northern District of Georgia. Three weeks later the Commission, acting pursuant to Section 706 (f)(2), brought its own suit for preliminary relief on respondent's behalf. The specific relief requested in each suit was respondent's reinstatement with back

pay pending final disposition of her charges by the Commission.

After a joint hearing, the district court dismissed respondent's suit for lack of subject matter jurisdiction (Pet. App. A16–A21) but granted the preliminary relief which the Commission had requested on her behalf.[1] The district court assessed against respondent the costs of her private suit, and denied any allowance of fees to her attorney. The court of appeals reversed, holding that the district court did have subject matter jurisdiction over respondent's private suit and that it therefore was "improper to charge her with the costs of the trial court action and to fail to consider the request for attorney's fees" (Pet. App. A15).

DISCUSSION

We agree with the court of appeals that the district court had subject matter jurisdiction over respondent's private suit for preliminary injunctive relief against employment discrimination.

1. The federal district courts possess "customary authority to grant temporary injunctive relief." *Sampson* v. *Murray*, No. 72–403, decided February 19, 1974 (slip op. 18).[2] Nothing in Title VII ex-

[1] The decision granting preliminary relief was affirmed *per curiam* on appeal, 475 F. 579, and this Court denied certiorari, 414 U.S. 854.

[2] In this case, unlike *Sampson* v. *Murray*, *supra*, the question whether the district court had authority to issue a preliminary injunction arises separately from the question whether the relief was properly granted, for the latter question was disposed of in separate litigation brought by the Commission. See n. 1, *supra*.

pressly bars victims of employment discrimination from bringing private suits for preliminary injunctive relief. Thus the district court here had jurisdiction unless the statutory scheme by necessary implication prevents the federal courts from exercising their customary equitable powers at the instance of a private party plaintiff.[5] Compare *Scripps-Howard Radio, Inc.* v. *Federal Communications Commission*, 316 U.S. 4, and *Sampson* v. *Murray*, *supra*, with *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, and *Atchison, T. & S.F. R. Co.* v. *Wichita Bd. of Trade*, 412 U.S. 800.

Under the statutory scheme established by Title VII, once a charge of employment discrimination is filed the Commission must investigate the charge, make a determination as to whether there is reasonable cause to believe that the charge is true, and, if it so finds, attempt conciliation. Before 1972, only the complainant could bring suit on the basis of the charge. This could be done at two junctures: (1) 30 days after the charge had been filed by means of the complainant's requesting a notice of right to sue; and (2) after final termination of the administrative proceedings upon the failure of conciliation.

Since 1972 the Commission itself may sue on the charge, but only after completion of the administrative process through failure of conciliation. The 1972 amendments did not abolish the private right of suit,

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[5] There is no jurisdictional issue apart from that raised by petitioner under Title VII: if that statute did not preclude respondent's suit, jurisdiction rested on 28 U.S.C. 1343(4). See *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409, 412, n. 1.

but they did extend the period during which the complainant ordinarily may not sue from 30 days to 180 days. The amendments also specifically authorized the Commission to seek preliminary relief on behalf of the complainant (see p. 4, *supra*). The principal question in this case is whether, in so doing, Congress barred a complainant from seeking preliminary relief prior to the expiration of the 180-day period during which a complainant ordinarily may not bring a suit on the merits. We submit that it did not.

Title VII as originally enacted made no provision for temporary or preliminary injunctive relief pending the Commission's disposition of a charge of employment discrimination. See p. 3, *supra*. But nothing in the statute suggested that such relief was thereby made unavailable to the aggrieved employee. To the contrary, Title VII conferred upon employees a statutory right to be free of employment discrimination, and the federal courts historically have possessed the equitable powers necessary to protect federal statutory rights, at least to the extent of preserving the *status quo* pending administrative action—which is all that is involved in the relief sought here. See, generally, Jaffe, *Judicial Control of Administrative Action* 677–686 (1965). Moreover, nothing in the legislative history or the language of the 1972 amendments suggests that Congress, by conferring upon the Commission the authority to bring suit for preliminary relief in appropriate cases, intended to limit or abolish any private right to sue for such relief.

2. The availability of preliminary injunctive relief at the instance of the aggrieved person is consistent

with the purpose and structure of the statutory scheme.

The broad goal of Title VII is the elimination of employment discrimination on account of race, color, religion, sex, or national origin, and Congress hoped that this comprehensive goal would be achieved primarily through conciliation and persuasion. The premature initiation of private suits for permanent relief might in some instances interfere with the Commission's conciliation efforts. And even if the private plaintiff were successful in obtaining full relief from discrimination against himself, the judicial remedy would (at least in the absence of a class action) tend to be narrower and more particularized than a voluntary conciliation agreement, which might cover all employees and all forms of discrimination. Moreover, final disposition of the individual cause of action could tend to reduce the employer's immediate incentive for voluntarily undertaking a more general compliance. It is at least partly for these reasons, we believe, that Title VII implicitly bars the bringing of private suits for permanent relief within 180 days of the filing of a charge (except where the Commission takes some action to permit an earlier suit). To this extent, the statute subordinates the individual's interest in full and immediate relief to society's interest in a more comprehensive solution to the underlying problem of employment discrimination.

But any reasons for barring private suits for *permanent* relief during the pendency of conciliation procedures do not similarly militate against the bringing of suits for *preliminary* relief. Such suits would not

disrupt the Commission's efforts at obtaining voluntary compliance; neither the grant nor the denial of preliminary relief would adversely affect compliance procedures. Since the denial of preliminary relief would not represent a decision on the merits of the employment discrimination claim, such a denial would be unlikely to make the employer more intransigent. And a grant of preliminary relief could in some cases "enhance * * * the effectiveness of conciliation by increasing the pressure on the [employer] to agree to settlement." Note, *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1258 (1971). Indeed, Congress evidenced its awareness that suits for preliminary relief are compatible with negotiations for voluntary compliance by empowering the Commission to pursue both courses simultaneously.

It may be assumed (at least for purposes of this case) that preliminary injunctive relief will be granted only in the special circumstances where preservation of the *status quo* is necessary to prevent irreparable harm.[4] But we believe that it is important

[4] Thus in *Jerome* v. *Viviano Food Company, Inc.*, 489 F. 2d 965 (C.A. 6), a denial of preliminary relief was affirmed where there was no showing of irreparable harm and the relief sought—an order requiring an employer to hire an unsuccessful applicant for employment—would in fact have changed the *status quo*. Contrary to the March 15, 1974, letter from petitioner's counsel, there is no conflict between *Jerome* and the decision below. *Jerome* was not decided on jurisdictional grounds but on the failure to show irreparable harm, and the court of appeals there expressly distinguished the instant case as one where irreparable harm had been established (489 F. 2d at 966).

to the effectuation of the broad statutory purposes that it be available in such exceptional cases, and particularly in cases, such as this, that involve an employer's retaliation against an employee on account of her assertion of Title VII rights. The enforcement of Title VII depends in large part on the willingness of employees and other affected individuals to file charges with the Commission; retaliation, which undercuts this basic enforcement mechanism by chilling employees' willingness to assert their rights, especially calls for an immediate remedy. Cf. *National Labor Relations Board* v. *Marine Workers*, 391 U.S. 418; *National Labor Relations Board* v. *Scrivener*, 405 U.S. 117.

Unfortunately, the workload and budget of the Commission are such that it is unable to sue for preliminary injunctive relief in all meritorious cases, or even merely in all meritorious retaliation cases. The Commission's limited resources permit it to sue for such relief only in especially compelling cases, on behalf of plaintiffs unable to obtain representation on their own. Therefore, if preliminary injunctive relief is to be broadly effective as a remedial device, it must be available at the instance of private party plaintiffs.

In short, the availability of preliminary relief at the instance of the aggrieved person in exceptional cases is necessary to full effectuation of the rights created by Title VII and does not conflict with the broader statutory goal of eliminating employment discrimination generally. In these circumstances, it would be anomalous to interpret the mere silence of Con-

gress as having the self-defeating effect of precluding such relief. See, generally, Note, *supra*, 84 Harv. L. Rev. at 1256–1259.

3. This Court in *Arrow Transportation Co.* v. *Southern R. Co.*, *supra*, inferred a congressional intent to bar suits for preliminary relief with respect to matters pending before the Interstate Commerce Commission. See, also, *Atchison, T. & S.F. R. Co.* v. *Wichita Bd. of Trade*, *supra*; *United States* v. *SCRAP*, 412 U.S. 669. In so deciding, the Court relied in part on the necessity of preserving that agency's primary jurisdiction to determine the reasonableness of rates and in part on the importance of maintaining a nationally uniform rate structure. But the statutory inference in that case derived principally from the congressional vesting of a limited suspension power in the agency; the legislative history of that suspension power, when read in light of the considerations of primary jurisdiction and uniformity, revealed a purpose "to withdraw from the judiciary any pre-existing power to grant injunctive relief." *Arrow Transportation Co.* v. *Southern R. Co.*, *supra*, 372 U.S. at 667. None of the factors which led to this Court's decision in *Arrow Transportation* are present here.

First, the Equal Employment Opportunity Commission has no suspension or cease-and-desist power. The Commission's only analogous authority is to bring suit for preliminary relief; that authority is not cast in exclusive terms and, as we have shown above (pp. 5–11, *supra*), there is no reason why that authority should be read as exclusively lodged in the Commis-

sion. Under the statute the ultimate power to grant relief remains in the courts, and they interfere with no prerogative of the Commission by granting such relief at the request of a private party.

Second, the Commission lacks "primary jurisdiction." As this Court observed in *Alexander* v. *Gardner-Denver Co.*, No. 72-5847, decided February 19, 1974 (slip op. 7):

> The Commission cannot adjudicate claims or impose administrative sanctions. Rather, final responsibility for enforcement of Title VII is vested with federal courts.

The Commission is not even empowered to make findings conclusive of private rights subject only to the narrow review normally accorded administrative decision-making. Thus even if the Commission finds that there is no reasonable cause to believe that a charge of employment discrimination is true, the person making the charge is nevertheless entitled to a *de novo* adjudication in a federal district court. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792. Similarly, a Commission finding of reasonable cause would carry no weight in subsequent litigation. Thus a tentative judicial assessment of the merits of an employment discrimination claim, made in the course of granting or denying preliminary relief, would not constitute a "judicial intrusion into the administrative domain." *Arrow Transportation Co.* v. *Southern R. Co.*, *supra*, 372 U.S. at 670.

Third, whereas in *Arrow Transportation* this Court was concerned with Congress' interest in preserving uniformity of rate levels, the uniformity Congress

sought by enacting Title VII was the nationwide elimination of employment discrimination. That goal is advanced by the availability of preliminary injunctive relief at the instance of a private party plaintiff.

CONCLUSION

For the foregoing reasons, it is the view of the United States that the decision of the court of appeals was correct and accordingly that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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